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No. 04-1270

In the Supreme Court of the United States

JOSHUA RIOS AND MARY CANALES,
Petitioners,

v.

DOYLE WAYNE SCOTT, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE; GARY JOHNSON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE; JANE CATHERINE COCKRELL, INDIVIDUALLY AND IN HER CAPACITY AS DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE; LESLIE WOODS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS REGION II DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE; ROY A. GARCIA, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SENIOR WARDEN OF THE COFFIELD UNIT OF THE INSTITUTIONAL DIVISION OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE; AND PATTI SIPPEL,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the Eighth Amendment require an isolated prison guard to immediately insert herself in the confrontation between an armed inmate who has escaped from his cell and an unarmed prisoner who is handcuffed while being transported through the prison hallways, and, if so, was such a right clearly established before March 16, 2000?

2. As to Petitioners' claims against the prison supervisors, did Petitioners offer sufficient evidence to satisfy their burden to overcome a qualified-immunity defense?

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RESPONDENTS' BRIEF IN OPPOSITION

Of the two questions offered by Petitioners, the first is over-determined on these facts and the second is not fairly presented. First, the Constitution does not create a mandatory, *per se* duty for a solitary correctional officer to put at risk their own life to stop a sudden violent attack rather than seeking the assistance of other officers. Second, in the guise of suggesting that the Fifth Circuit misapplied the law, Petitioners merely ask this Court to second-

guess the evidentiary judgments that were made by the district court and affirmed on appeal.

STATEMENT OF THE CASE

Course of Proceedings and Disposition Below

Petitioners challenge an unpublished *per curium* decision of the Fifth Circuit that affirmed summary judgment for the Respondents on the grounds of qualified immunity. Petitioners, who are the family members of a deceased inmate, brought claims including claims for money damages under 42 U.S.C. §1983. (App.5)[1] After Respondents moved for summary judgment on the question of qualified immunity, and after the Magistrate Judge recommended that the motion for summary judgment be granted, (App.28-29), the district court rendered judgment in favor of the Respondents on July 28, 2003 (App.30).

On June 3, 2004, the Court of Appeals for the Fifth Circuit affirmed in a decision joined by Chief Judge King, Judge Reavley, and Judge Garza. *Rios, et al. v. Scott, et al.*, No. 03-41088, 100 Fed.Appx. 270 (5th Cir. 2004).

Statement of Facts

On March 16, 2000, correctional officer Patti Sippel was escorting a handcuffed inmate from the shower area to his cell on another floor, both of which were part of the prison's administrative segregation unit. (App.45.) While transporting the inmate, Officer Sippel was carrying a baton but no other weapons. (App2.) She was escorting inmate Rolando Rios, who was a known member of a prison gang. (App.2.) The inmate was handcuffed to minimize the safety risk that he would pose to the escorting officer. (App.5.)

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1. Cites to "ROA" refer to the appellate record in the Fifth Circuit. Cites to "App" refer to the appendix to the petition for review.

As Officer Sippel was escorting Rios to the landing of the stairwell to his floor, they were jumped by an escaped inmate armed with a sharpened metal weapon of the type known as a "shank." (App.5.) The escaped inmate, Antonio Lara, stabbed Rios in the back, repeatedly and quickly. (App.5.) When Officer Sippel assessed the situation, she fled from the armed inmate to seek assistance. (App.5.) That assistance came, but the wounds inflicted by Lara were fatal, as Rios later died after receiving medical attention. (App.5.)

Lara had broken out of his cell, which was on the same floor as the attack. (App.5.) Before breaking out and attacking Rios, Lara had been under monitoring as a potential member of a prison gang, but it had not yet been confirmed that he was a member. (App.2.)

SUMMARY OF THE ARGUMENT

Neither of the questions presented warrants review by this Court. First, there is no absolute constitutional duty requiring a correctional officer to risk her own life rather than retreating to seek appropriate backup. It is eminently reasonable for such an officer to seek help rather than to unilaterally intervene, putting her own life at risk by attempting to personally overpower an armed, escaped inmate who is in the midst of a violent attack. Quite unsurprisingly, there is no dispute among the Circuits on this common-sense principle of law.

Second, the record in this case does not support Petitioners' claim that the prison supervisors were deliberately indifferent. The Fifth Circuit examined the snippets of testimony and other evidence offered by Petitioners—which make up the bulk of their petition to this Court—and rightly concluded that, "[h]ere, there was no evidence that the supervisory officials were deliberately indifferent to inadequate staffing, cell searches, training or potential gang conflict." (App.6) This is a dispute about facts, not law, and there is no need for this Court's intervention against an unpublished *per*

curium decision applying well-settled law to an unusual set of facts. The writ should accordingly be denied.

REASONS TO DENY REVIEW

I. THERE IS NO SPLIT ABOUT WHETHER A CORRECTIONAL OFFICER MUST PUT HERSELF IN UNREASONABLE PHYSICAL DANGER IN ORDER TO INTERVENE AGAINST AN ARMED INMATE.

In order to avoid summary judgment on their claims against Officer Patti Sippel—the only officer who was personally escorting Rios when an escaped, armed inmate attacked—Petitioners were required to establish that no reasonable officer in her position could have, consistent with the Constitution, sought help instead of immediately intervening.

This is because qualified immunity protects government officials from certain claims brought pursuant to §1983. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). To overcome the defense of qualified immunity, plaintiffs must first must show that the plaintiff has alleged a violation of a clearly established constitutional right. *Siegert v. Gilley*, 500 U.S. 226, 232 (1991). Once plaintiffs have overcome the first prong of the analysis, they must introduce sufficient evidence that the defendant's conduct was objectively reasonable. *Siegert*, 500 U.S. at 232.

The district court examined the summary-judgment record before it and held that there was no constitutional duty for Officer Sippel to immediately intervene to stop this attack. (App.21-22) The Fifth Circuit affirmed, holding that "the [Petitioners] could not meet their burden to demonstrate that all reasonable officers similarly situated would have then known that the failure to intervene violated the Constitution." (App.5-6)

The Fifth Circuit's refusal to retroactively impose an absolute duty to intervene—especially where an isolated officer would have been subjecting herself to great physical danger—comports perfectly with the decisions of other Circuits and with this Court's guidance.

In cases presenting similar facts, other Circuits have reached similar results. In a case in which a prison guard reacted by seeking help rather than individually trying to break up a fight, the Eighth Circuit held that "prison guards have no constitutional duty to intervene in the armed assault of one inmate upon another when intervention would place the guards in danger of physical harm." *Prosser v. Ross*, 70 F.3d 1005, 1008 (8th Cir. 1995). The Fourth Circuit has agreed that "such heroic measures are not constitutionally required." *Winfield v. Bass*, 106 F.3d 525, 532 (4th Cir. 1997) (en banc). See also *Odom v. South Carolina Dept. Of Corrections*, 349 F.3d 765 (4th Cir. 2003); *Peate v. McCann*, 294 F.3d 879 (7th Cir. 2002); *MacKay v. Farnsworth*, 48 F.3d 491(10th Cir. 1995).

This Court has also recognized the uniquely difficult task facing prison officers. The day to day problems arising in the operation of a prison are not susceptible of easy solutions. *Bell v. Wolfish*, 441 U.S. 520, 547, 99 S. Ct. 1861, 1878 (1979). Prison administrators are accorded a great deal of deference "in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Id.* In part, this is because of the danger facing all prison staff:

> Prisons, by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for antisocial criminal and often violent, conduct. Inmates have necessarily shown a lapse in ability to control and conform their behavior to the

> legitimate standards of society by the normal impulses of self-restraint; they have shown an inability to regulate their conduct in a way that reflects either a respect for law or an appreciation of the rights of others.

Hudson v. Palmer, 468 U.S. 517, 526 (1984). Within that context, the Court has recognized that certain situations can arise in which "the decisions of prison officials are typically made 'in haste, under pressure, and without the luxury of a second chance,'" carving for those cases involving excessive force a special, higher standard of culpability than mere deliberate indifference. *Farmer v. Brennan*, 511 U.S. 825, 835-36 (1994). Although the accusation against Officer Sippel is somewhat different—it is that she did not use enough force—there is no doubt that the haste and pressure confronting her were of the same, if not greater, dimension.

Although Respondents would contend that there is still no such absolute constitutional duty to intervene in the unusual circumstances offered by this case, at the very least the precedents of other Circuits bolster the Fifth Circuit's holding that such a right would not have been well-established at the time of this attack. To overcome qualified immunity, "the contours of the right allegedly violated [must be] sufficiently clear that a reasonable official would understand that what he or she was doing violated that right." *Anderson*, 483 U.S. at 640. Thus,"[a]n official enjoys qualified immunity if a reasonable official would be left uncertain of the application of the standard to the facts confronting him." *Hopkins v. Stice*, 916 F.2d 1029, 1030-31 (5th Cir. 1990). Accordingly, Officer Sippel is entitled to qualified immunity and the Fifth Circuit correctly affirmed the dismissal of these claims against her.

II. THIS CASE DOES NOT PRESENT THE QUESTION OF WHETHER OFFICIALS MUST KNOW OF THREATS AGAINST A SPECIFIC INMATE.

Petitioners also claim that the supervisors of the prison were deliberately indifferent so as to permit Lara's attack on Rios. Petitioners accuse the Fifth Circuit of disagreeing "with the . . . holding that a risk of violence specific to the inmate/plaintiff is not required." (Pet.13). Petitioners argue that such a rule would conflict with precedent and other Circuits. But this case does not present the question. Indeed, the Fifth Circuit did *not* apply any such rule, instead concluding that the evidence here was simply insufficient. Confirming that, other Fifth Circuit precedent—including a more recent, *published* opinion—make clear that the Fifth Circuit does not disagree with the decisions Petitioners cite as purported conflicts. Petitioners' disagreement with the Fifth Circuit is merely an evidentiary dispute that does not implicate this legal rule.

A. The Fifth Circuit's Decision Did Not Turn On—Indeed, Did Not Even Refer to—Any Concept That Officials Would Need to Know About Risks to the Specific Inmate.

The Fifth Circuit decision that the prison supervisors were not deliberately indifferent was based on its evaluation of the record, not on any purported rule that a risk to the specific inmate must have been shown. The court did not suggest that it was making any distinction whatsoever about whether the officials knew about risks to inmates in general or to Rios in particular. Rather, it concluded that "there was no evidence that the supervisory officials were deliberately indifferent to inadequate staffing, cell searches, training or potential gang conflict." (App.3).

B. The Court of Appeals's Decision Is Not In Conflict With Other Circuits or This Court's Precedent.

The petition claims that the Fifth Circuit has failed to follow *Farmer v. Brennan*, 511 U.S. 825 (1994), *see* Pet.12, suggesting that the court improperly would require plaintiffs to show that the prison officials knew of some risk unique to a particular plaintiff rather than a more generalized risk. But the Fifth Circuit follows *Farmer v. Brennan*, as is made plain by its citation to that case for the controlling legal principle. (App.3).

Indeed, the Fifth Circuit has expressly relied on this aspect of *Farmer v. Brennan* in a published decision issued after the decision in this case. *Hernandez v. Tex. Dep't of Prot. and Regulatory Servs.*, 380 F.3d 872, 881-882 (Tex. 2004) ("a prison official may not escape liability for deliberate indifference by showing that . . . he did not know that the complainant was especially likely to be assaulted by a specific prisoner") (citing *Farmer*, 511 U.S. at 843)). If the unpublished *per curium* decision in the present case had created any doubt—unlikely both because of its silence on this question and the local circuit rule making unpublished decisions non-precedential, *see* FIFTH CIR. R. 47.5.4—this more recent express statement of the Circuit should allay any concern that there could be conflict over this point.[2]

For much the same reasons, the petition is wrong to assert that the Fifth Circuit is in conflict with the Sixth Circuit and the Eleventh Circuit on this issue. The cases cited by petitioner merely restate the *Farmer* rule that there is no need to show evidence of a risk specific to a particular inmate. *Street v. Corrections Corp. of*

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2. Unpublished decisions from the Fifth Circuit have also continued to expressly follow this rule. *See Edmond v. Eaves*, 70 Fed. Appx. 159, 160 (5th Cir. 2003) (per curium) (unpublished); *El-Mumit v. Foster*, 232 F.23d 207 (table), 2000 WL 1272453, at *1 (5th Cir. 2000) (per curium) (unpublished).

Am., 102 F.3d 810, 817 (6th Cir. 1996); *Hale v. Tallapoosa County*, 50 F.3d 1579, 1583 (11th Cir. 1995). The Fifth Circuit agrees with that rule. The only divergence is the result that each court reached when evaluating the particular summary judgment record before it, and there is no need for this Court to re-weigh the evidence evaluated by the district court and affirmed by the court of appeals.

C. The Fifth Circuit's Evaluation of the Evidence Does Not Warrant Review.

The Fifth Circuit concluded that the evidence offered by Petitioners did not meet their burden. (App.3) That evaluation was reasonable and does not warrant this Court's review.

For example, Petitioners place great reliance on the testimony of their purported expert, Thomas A. Rosazza, in an attempt to meet the deliberate indifference standard. (Pet.6). Yet, the district court concluded that Rosazza's specific conclusions were unfounded and that he had failed to established his qualifications to even offer such opinions. (App.15) It is quite understandable that the Fifth Circuit did not rely on this unqualified, unfounded testimony as sufficient evidence that the supervisory officials were deliberately indifferent. Nor should this Court pla e undue reliance those unqualified, unfounded conclusions.

Mr. Rosazza fails to detail his education or training that would qualify him as an expert. (App.15) Furthermore, Mr. Rosazza fails to provide any foundations for his opinion. (App.15) He simply bases his conclusions on the Petitioners' allegations and statements from two inmates, which is insufficient. (App.15).

The fact that an incident happened cannot be enough to establish culpability under §1983, a type of claim aimed at individuals. In *Farmer*, this Court required both an objective and a subjective component of *mens rea* in order to establish the deliberate indifference that would lead to an Eighth Amendment

violation. *Farmer*, 511 U.S. at 834. The offender must first show the alleged deprivation to be objectively and sufficiently serious—that he is "incarcerated under conditions posing a substantial risk of serious harm." *Farmer*, 511 U.S. at 834, 114 S. Ct. at 1977. He must then show a "sufficiently culpable state of mind." *Id.* The plaintiff must demonstrate that the defendant prison official had a *mens rea* equivalent to that required for criminal recklessness—that the official knew of and disregarded an excessive risk to inmate health or safety. *Farmer*, 511 U.S. at 837, 114 S. Ct. at 1979. "[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.*

Accordingly, supervisors cannot be held liable under § 1983 simply because they are supervisors. *Jacquez v. Procunier*, 801 F.2d 789, 793 (5th Cir. 1986). For a supervisor to be held liable, he must participate in the acts found to be unconstitutional or implement unconstitutional policies that cause the alleged constitutional violation. *Mouille v. City of Live Oak*, 977 F.2d 924, 929 (5th Cir. 1992) citing *Grandstaff v. City of Borger*, 767 F.2d 161, 169-170 (5th Cir. 1985) *cert. denied* 480 U.S. 916 (1987). Petitioners failed to present any evidence that the individual supervisors that they sued engaged in any unconstitutional acts or set any unconstitutional policies that were causally related to Petitioners' injury.

Petitioners argue that the prisoner supervisors are liable because of inadequate staffing, searches, training, and gang conflict. (ROA pp. 144-146). In making these charges, Petitioners place great reliance on the after-the-fact investigation, which was recorded in a Serious Incident Review. This after-the-fact investigation does not demonstrate the *prior* mental awareness necessary to overcome a qualified immunity defense.

Nothing in the Serious Incident Review indicates that there was inadequate training or that the training of the correctional officers working at the Coffield Unit was either the direct or indirect cause of Rios's death.[3] (ROA pp. 416-428).

Nor does anything in the Serious Incident Report indicate that inadequate staffing was either the direct or indirect cause of death of Rios. Indeed, the Serious Incident Report concludes that the wing where the incident occurred was staffed as required (ROA p. 425). Nor does the Serious Incident Report fails to state that two officers were to have escorted Rios to and from the shower as alleged by the Petitioners. Only level 2 and 3 offenders required two correctional officers to escort them to and from the shower (ROA p. 422). Rios was classified as a level 1 offender (ROA p. 420). The Serious Incident Report stated that one correctional officer may escort a level 1 offender (ROA p. 423).

And nothing in the Serious Incident Report indicates that inadequate searches were either the direct or indirect cause of the death of Rios (ROA 416-428). While the Serious Incident Report

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3. Petitioners also failed to show a pattern of similar incidents. *Board of County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 409 (1997). The only evidence they offered in the district court was the transcript from a hearing in the case of *Adames v. Perez*, United States District Court for the Southern District of Texas, Corpus Christi Division, Civil Action No. C-99-437 (ROA pp. 231-251). Here, the magistrate considered that evidence and concluded it insufficient. (App.13) Indeed, in *Adames* the Fifth Circuit ultimately vacated and remanded the case back to district court for further proceedings, finding that a judgment against the defendant TDCJ supervisory officials resulted in a manifest miscarriage of justice. *Adames v. Perez*, 331 F.3d 508 (5th Cir. 2003). In the remand of that case, the District Court granted summary judgment on August 30, 2004, in favor of the prison officials, finding that they were not deliberately indifferent and were entitled to qualified immunity. That single hearing transcript hardly shows a sufficient pattern of similar incidents.

does indicate that the attacker's cell was not searched for 11 days prior to the attack and that the policy regarding searches of cells, recreation yards and showers was not being followed to the letter (ROA p. 422), there is nothing in the Serious Incident Report to indicate that the supervisory Respondents played a role in making decisions that would constitute deliberate indifference concerning the search procedures followed at the Coffield Unit (ROA 416-428). Consequently, there is nothing in the Serious Incident Report which would provide evidence of deliberate indifference by the supervisory defendants with regards to cell searches.

Lastly, Defendants-Appellants allege that Rios and Lara should not have been housed in the same area as they were both gang members. However, nothing in the Serious Incident Report indicates that the supervisory officials knew of a potential gang conflict between Rios and Lara and, thus, nothing suggests that any reshuffling of prisoners to lessen gang conflict would necessarily have separated Rios and Lara. While Rios was a confirmed gang member (ROA p. 254), Lara was not a confirmed gang member at the time of the attack (ROA p. 254).

There is no reason for this Court to revisit the evidentiary judgments made by the Fifth Circuit in applying well-settled law.

CONCLUSION

Respondents respectfully request that the Court deny the petition for writ of certiorari.

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